88- 1788

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DAVID JOHN DANNER, PETITIONER
V.
DOROTHY KLOSTERBUER,
Assistant Johnson County Attorney,
and
DIRECTOR,
Child Support Recovery Unit,
STATE of IOWA ex rel.

PETITION FOR WRIT OF CERTIORARI FROM THE IOWA SUPREME COURT AND REQUEST FOR SUMMARY REVERSAL

DAVID JOHN DANNER
Petitioner, pro se
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QUESTION PRESENTED

Whether or not an alleged illegal order made by the Iowa district court, which exists without basis or support in the record of the case to which this petitioner is party, acts in violation of the Fourteenth Amendment's guarantee of due process.

All parties to this case are listed in the caption except for the real party in interest, Kathleen Ann Danner, upon whose behalf the State of Iowa ex rel. does act.

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PETITION FOR WRIT OF CERTIORARI FROM THE IOWA SUPREME COURT AND REQUEST FOR SUMMARY REVERSAL

Petitioner, David John Danner, respectfully prays that a writ of certiorari issue to summarily reverse an order of the Iowa supreme court which denies his application for further review there.

OPINIONS BELOW

The opinion from the Iowa court of appeals, (App. B, infra, p. 18a-21a), in the certiorari appeal is at 434 N.W.2d 921 (Iowa App. 1988). A previous opinion of the Iowa court of appeals, (App. C, infra, p. 22a-23a), from the dissolution case appeal, is at 404 N.W.2d 589 (Iowa App. 1986) Table. The order from the Iowa district court, (App. D, infra, p. 24a-25a), in the dissolution case, is not reported.

JURISDICTION

The opinion from the Iowa court of appeals, (App. B, infra, p. 18a-21a), was filed on November 29, 1988. An application for further review, (App. A, infra, p. 17a), in the Iowa supreme court, was denied on February 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III of the Constitution also provides in pertinent part:

> Section 2. Clause 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States, -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

3. Section 252B.5 subsection 3, entitled "Services of unit.", In Chapter 252B, entitled "CHILD SUPPORT RECOVERY", of the 1983 Iowa Code Supplement provides:

> 3. Aid in enforcing through court proceedings an existing court order for support issued pursuant to chapters 252A, 598, and 675.

4. Section 598.2, entitled "Jurisdiction and venue.", in Chapter 598, entitled "DISSOLUTION OF MARRIAGE", of the

Code of Iowa (1983) provides:

> The district court has original jurisdiction of the subject matter of this chapter. Venue shall be in the county where either party resides.

5. Section 602.4201 subsection 1, entitled "Rules governing actions and proceedings.", in Chapter 602, entitled "THE COURTS", of the 1983 Iowa Code Supplement provides:

> 1. The supreme court may prescribe all rules of pleading, practice, evidence, and procedure, and the forms of process, writs, and notices, for all proceedings in all courts of this state, for the purpose of simplifying the proceedings and promoting the speedy determination of litigation upon its merits. Rules are subject to section 602.4202.

STATEMENT OF THE CASE

The state civil proceedings, undertaken to collect a judgment for child support, were commenced on or about May 14, 1984, in the Iowa district court for Johnson County. This petitioner is and was a resident of Johnson County since a final decree of dissolution in the equity case no. 1748, was granted to his ex-wife Kathleen Ann Danner, on February 11, 1975, in Johnson County.

No action had been taken nor any papers filed to this case during the interim period from 1975-1984.

His ex-wife had absented herself, taking his minor child from the state of Iowa shortly after receiving the final decree in early 1975. She moved to Nebraska but did not tell her ex-husband, who was unable to locate his daughter until May, 1979.

All that was necessary in order that a writ of execution issue from the clerk of the district court was the filing of an affidavit by the Asst. Johnson County Attorney stating that this petitioner was in arrears on payments to the child support judgment contained in the final decree. The wages of Danner were then garnished in May, 1984. After notice of the garnishment, this petitioner filed several motions with the district court there.

After having been overruled, Danner then filed several other

motions pointing to the fact that the district court had mistakenly assumed all payments were to be made to the clerk of the district court but where the final decree contained no such provision for payment to the clerk, only the amount due each week.

After hearing these next motions, the district court again overruled Danner but placed a bar upon the collection of a portion of the judgment by reason of the laches of his ex-wife, attributed to her seclusion during the years 1975-79. This particular, specific order of the district court was filed on August 31, 1984, (App. H, infra, p. 37a-39a).

In the same hearing held on August 31, 1984, in oral argument, in open court, Danner apprised the district court judge of his intent to file a pleading or answer to the matters before the court. (Equity case no. 1748; Iowa appeal no. 85-1188; Appendix p. 10, (from reporter's transcript)).

On September 11, 1984, this petitioner filed papers specifically denominated as an answer, pleading estoppel specially, attaching documentary evidence of waiver and including a counterclaim held against his ex-wife, all of which is certified and verified, (App. G, infra, p. 32a-36a).

This petitioner, then pro se as now, attempted to obtain reponses to written interrogatories from his ex-wife, through the offices of both states, Iowa and Nebraska. No written responses were ever placed on file by his ex-wife.

Some time later he attempted to obtain and filed a motion to obtain certain materials relevant to the case from the states involved. No documents were produced or placed on file.

Danner then filed a motion for declaratory judgment, incorporating and brought wholly upon the answer in the Iowa district court for Johnson County, which has sole jurisdiction over all subject matter in the dissolution case named here.

This petitioner then obtained personal jurisdiction over his ex-wife by having her served with proper notice and copy of the motion for declaratory judgment, (App. F, infra, p. 28a-31a).

A return of service was made to the Iowa district court by Douglas County, Nebraska.

After a hearing on the same day, the Iowa district court, on July 19, 1985, made an order, which referred to the order of August 31, 1984, and overruled the motion for declaratory judgment upon grounds of prior litigation and incorrect procedure, (App. D, infra, p. 24a-25a).

An appeal was taken after the order of July, 1985, but trial court was affirmed by the Iowa court of appeals on June 25, 1986, (App. C, infra, p. 22a-23a). An application for further review of this appeal was denied by the Iowa supreme court on August 29, 1986.

The respondents to this petition, as captioned here, then filed their own order for mandatory income withholding on August 15, 1986, in the Iowa District court.

This petitioner then proceeded to file a state certiorari petition in the Johnson County district court, challenging the action of these respondents on various legal grounds, including the fact of waiver, (App. E, infra, p. 25a-27a). After the writ issued from the district court and a return was made by these respondents, a hearing on the writ was held and an order filed on January 11, 1988, which annulled the writ in the district court.

Danner then appealed this order annulling the writ and the Iowa appeals court sustained the writ, reversing trial court, on November 29, 1988, citing statutory grounds requiring proper notification, (App. B, infra, p. 18a-21a). Danner then urged the Iowa supreme court to expand the scope of its certiorari review to encompass the alleged illegal order of July, 1985 also, but his application for further review was denied there on February 3, 1989, (App. A, infra, p. 17a).

There has been no specific issue raised during any state court proceeding or paper on file below, with specific citation to a federal question.

The focus of this petitioner's arguments during any state

court proceeding has revolved upon two axis, these being (a) error in equity; (b) illegality during certiorari; each having specific references with appropriate citations to the district court order made in July, 1985. (Respondent's brief, case no. 1748; appeal no. 85-1188) also (Plaintiff's brief, case no. 50241 appeal no. 88-207).

A direct comparison of the entire language contained in each; the district court order of August 31, 1984, (App. H, infra p. 37a-39a), this petitioner's answer filed September 11, 1984, (App. G, infra, p. 32a-36a), and the district court order of July 19, 1985, (App. D, infra, p. 24a-25a), must suffice in order to raise a federal question of due process simply because all issues contained in the answer have been illegally suppressed by the district court in July, 1985, and no issue plead in the answer has ever been passed upon by any state court.

A single common thread linking the equity and certiorari proceedings below is the certified copy of a legally binding waiver executed by his ex-wife and attached to his answer and his petition in the state district court. ,

REASONS FOR GRANTING THIS PETITION

These respondents, acting in privity with this petitioner's ex-wife, as State of Iowa ex rel., instituted the proceedings in the Iowa district court to collect a judgment for child support.

1.a None of the challenges brought to this Court by this petition pertain to the constitutionality of any existing statute or administrative rule extant in Iowa at any time. Further, this petitioner does not take issue with any adverse judgment which might have issued in the proceedings rendered by the state courts during any phase of the dissolution case. Here, before this Court the sole issue and the subject matter of this petition is the question of due process. The question, so raised, can only be decided ultimately on the alleged illegality of the order made by the Iowa district court for Johnson County in July, 1985, as part

of the remedial proceedings instituted by these respondents, (App. D, infra, p. 24a-25a).

b Since by its decision of November, 1988, the Iowa appellate court has sustained a writ of certiorari directed to the respondents, the issue of mootness should be considered in the context of this petition. Mootness however, does not merit attention because the district court's order of July, 1985, illegally overrules and denies a responsive pleading made by this petitioner there. This alleged illegality and subsequent violation of the Fourteenth Amendment's guarantees regarding due process arose only when the Iowa supreme court declined to pass upon the alleged illegal order thereby sending the federal question to this Court.

All of the issues contained in the answer below remain viable matters which merit adjudication and have not been precluded by previous litigation.

The simple fact is, the record so made in the district court will not support a single contention espoused by this order as basis for the denial of this petitioner's motion for declaratory judgment which incorporates the answer.

Notwithstanding the writ sustained below, mootness cannot act to further deny any issue which has or is already being denied by the alleged illegal order of July, 1985, and brought to question here upon grounds of due process.

2. In this case there exists the issue of property as applied to the legal wages due this petitioner from his employer, (App. I, infra, p. 40a). The epithet "property" is found fully within the language of Section 1 of the Fourteenth Amendment.

The due process clause or Section 1 of the Fourteenth Amendment acts to place procedural constraints upon the actions of government, that work a deprivation of certain interests which enjoy the status of "property". The underlying substantive interest is created by "an independent source such as state law," but federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by

the Due Process Clause. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-577 (1972); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 541 (1985).

There can be no question that the legally constituted wages of the petitioner as property fall within the protection of Section 1 of the Fourteenth Amendment.

3.a It is assumed arguendo, that where these respondents remedial action in the state district court were brought forward in equity, it matters not whether the certiorari challenges, in either the state courts or in this Court, are at law.

Essential to due process is that a deprivation of life, liberty, or property, "be preceded by notice and opportunity for hearing appropriate to the nature of the case.". In *Cleveland Board of Education v. Loudermill*, supra, at 542.

This petitioner has steadfastly maintained before the state courts and asserts here also, that the process to be applied and that which governs any proceedings in the state dissolution case are those found squarely within the Iowa Rules of Civil Procedure (1984), notwithstanding any applicable statue within the Code of Iowa.

All such rules of civil procedure within the jurisdiction of the Iowa supreme court, derive from Section 602.4201 subsection 1 of the 1983 Iowa Code Supplement.

It remains fully consistent with those rules of procedure which obtain in the Iowa district courts, that Danner filed his answer in accordance with rule 72, I.R.C.P. (1984), with the state district court after having had several motions heard there in Johnson County. The full text of rule 72 is found in footnote.[1]

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1. Rule 72, Answer, I.R.C.P. (1984) provides:

"The answer shall show on whose behalf it is filed, and specifically admit or deny each allegation or paragraph of the petition, which denial may be for lack of information. It must state any additional facts deemed to show a defense. It may raise points of law appearing on the face of the petition to which it responds. It may contain as many defenses, legal or equitable, as the pleader may claim, which may be inconsistent. It may contain a counterclaim which must be in a separate division."

Under Iowa civil procedure both rule 69(b) and rule 109 explicitly differentiate between "motions" and "pleadings". One is not the other.

The order of August 31, 1984, by the state district court, specifically toils the time period under which any subsequent pleading may be filed. By adding the ten days granted by rule 85(c), I.R.C.P. (1984), to the three additional days given for service by mail under rule 83(b), I.R.C.P. (1984), one can calculate this petitioner had until September 13, 1984, in which to file a pleading with the district court. His answer was filed in district court on September 11, 1984, (App. G, infra, p. 32a-36a).

There has been no specific procedural rule cited by these respondents or by the author of any opinion in the state courts which would act as a bar upon procedural grounds.

It is commonly accepted within Iowa that any rulings upon the legal rights of a plaintiff must rest on the applicable sections of code or statute which were in effect at the time an action was taken. See *Webb v. Iowa Dist Court for Johnson County*, 416 N.W.2d 95, 97-98 (Iowa App. 1987).

While this matter remains a civil proceeding, in an opinion reached by this Court it was found the mere existence of a basis for a state procedural bar does not deprive this court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See *Caldwell v. Mississippi*, 105 S.Ct. 2633, 2638 (1985).

b The sole point upon which this petition turns is whether or not this petitioner had a right to file an affirmative defense as contained in a responsive pleading, which doesn't duplicate, as plead, any issue previously before the district court; and if he had the right to file such a pleading, should the answer be given plenary consideration by the district court based solely upon the merit it might contain.

In oral argument at the hearing held on the writ, in the state district court, these respondents stated, in open court,

that certiorari was not a proper remedy for any objection this petitioner might wish to raise there. Instead, it was suggested the only legal recourse available to this petitioner there, was a motion to quash. (Certiorari case no. 50241; Iowa appeal no. 88-207; Appendix p. 8, (from reporter's transcript)).

The opinion by the Iowa appellate court from November, 1988, which sustains the writ directed to these respondents, cites Chapter 252D of the Iowa Code (1987), which provides this petitioner be notified of any order by respondents and informed of "the procedure to file a motion to quash", (App. B, infra, p. 18a-21a). This petitioner had filed a motion to quash, but in 1984, (App. I, infra, p. 40a), and which was overruled. This section of statute was not in force in 1984, but these respondents obtained a writ of execution, thereby attaching Danner's wages and it was this writ he sought to quash then.

This petitioner by the cumulative effect of all motions he placed on file in state district court raised specific objections and introduced various facts both by motion and affidavit, all of which were verified by him.

With specific reference to rule 72, the Iowa supreme court has provided that the rule enunciates general principles as to what matters may be put in issue by or provable under a general denial, and what matters must be specially pleaded as affirmative defenses. See *Foods, Inc. v. Leffler*, 240 N.W.2d 914, 920 (Iowa 1976).

In this same vein, the Iowa supreme court has clearly stated that " . . . estoppel cannot be relied upon when not pled.". See *Iowa Department of Revenue v. Iowa Merit Employment Commission*, 243 N.W. 2d 610, 616 (Iowa 1976). Estoppel is contained within the rubric of affirmative defenses.

While not stated explicitly in these terms, the state courts in addition to these respondents, appear to be holding contradictory or mutually exclusive positions on matters of affirmative defense. It is required both by civil procedure and the common

law that all matters of affirmative defense be contained in a proper pleading. The rules state a "motion" is not a "pleading".

Contrary to this, these respondents sought and have successfully limited in this case below, only those objections which are or could be raised by a motion to quash, after which any further proceedings are barred by an assertion of the judicial doctrine of res judicata. The previous statement applies notwithstanding the appellate court having sustained the writ below.

One is then left with the unenviable task of trying to reconcile the two disparate positions between motions and pleadings, which this petitioner has attempted in his briefs and papers on file with the state courts.

As Mr. Justice Douglas has so cogently affirmed in his concurrence to *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951):

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."; *Joint Anti-Fascist Refugee Committee v. McGrath*, supra, at 179.

4. The sole jurisdiction to review the final judgment of a state court under 28 U.S.C. 1257(a), now rests in this Court. The proceedings in the Iowa district court where the alleged illegal order first issued were judicial in nature.

A judicial inquiry investigates, declares and enforces liabilities as they stand on present and past facts and under laws already in existence. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983).

The ex-wife of this petitioner has been and is a resident of Nebraska. Were it not for the state court proceedings, it would seem probable that federal diversity jurisdiction could be invoked under Article III Section 2. Clause 1. of the Constitution

after the state's final decree, in order to enforce the judgment.

The same standards which do obtain in a diversity jurisdiction would apply to this petition. Thus the source of substantive rights entered by a federal court under diversity is the law of the states. Where that law is authoritatively declared by a state, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law whether the forum of application is a state or federal court and whether the remedies be sought at law or may be had in equity. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945).

Petitioner most emphatically asserts here, the fact no other remedy is available to correct the alleged illegal order made by the state district court on July 19, 1985, which excluded, suppressed and denied him a responsive pleading on illegal grounds.

Although this is not a criminal matter, nor was the case tried to a jury, nor is this petitioner an indigent defendant, this case does bear resemblance to an opinion delivered by this Court in *Ake v. Oklahoma*, 105 S.Ct. 10[illegible]. (1985), insofar as the following language might apply to the conduct of the State of Iowa ex rel., during any proceedings below. In *Ake*, this Court stated that unlike a private litigant, a state may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. *Id.* at 1094.

This petition cannot be held to constitute a collateral attack upon the order made by the state district court. As found in *Allen v. McCurry*, 449 U.S. 90 (1980), federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. However a general limitation repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the issue in the earlier case. *Id.*, at 94-95.

Petitioner asserts the order in question clearly violates

the due process guarantees and equal protection clause of the Fourteenth Amendment. This Court clearly has jurisdiction and possesses the sole remaining remedy for any such violations by the state district court.

5. Some months after the answer was filed, this petitioner chose to bring it before the district court by way of a motion for declaratory judgment. It is this motion that trial court is alleged to have illegally overruled.

Previous to having filed this motion for declaratory judgment, he had attempted to obtain discovery of various materials and have written interrogatories placed on file by his ex-wife. It was and is the belief of Danner that a substantial portion of any defense to which he might avail himself lay undiscovered in addition to being undisposed of by any motion he might have filed previous to this motion for declaratory judgment.

On a motion for declaratory judgment the question in each case is whether the facts alleged under all circumstances show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See *Zwickler v. Koota*, 88 S.Ct. 391, 393 (1967).

This same language is present in paragraph 6. and paragraph 2. of the motion for declaratory judgment as filed in the state district court by this petitioner, (App. F, infra, p. 29a-30a).

Petitioner would also assert that the objective of legislation and jurisprudence is to assure litigants full protection for all substantial rights intended to be afforded them by the jurisdiction in which the right originates. See *Garret v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942).

In light of all the foregoing it can be reasonably stated and assumed that this petitioner had every right to plead and file an affirmative defense with a counterclaim, where no such prior pleading was either made or passed upon, and where no statutory or procedural bar exists which would act to deny this petitioner

any such favorable ruling in the Iowa district court were it not for the alleged illegal order made there in July, 1985.

It is then that a redetermination of the issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 (1982).

Under certain sets of circumstances it is conceivable that a trial court may decline to render a declaratory judgment by reason of lack of evidence. It is usual however to recite this or otherwise make it explicit within the ruling which denies the motion. With reference to a bench trial, see rule 179(a), I.R.C.P. (1984), which is drawn from its federal corollary, rule 52(a), F.R.C.P.

The evidence attached to his answer and his petition in the state district court is clear, undisputed and admitted there. That evidence is a certified copy of waiver, in document, executed by his ex-wife.

With regard only to the motion for declaratory judgment, which incorporated the pleading of September, 1984, a simple test determining whether an action is barred under the doctrine of res judicata, is whether the same evidence will maintain the present and the former action, assuming that the motions in this case in August, 1984, were an "action". See *Clark v. Glanton*, 370 N.W.2d 606, 608 (Iowa App. 1985). This petitioner asserts (emphasis) an August, 1984, ruling could not possibly have encompassed evidence introduced as part of a pleading in September, 1984.

Also where the evidence of waiver is undisputed and admitted the issue becomes one of law for the court. See *Scheetz v. IMT Ins.(Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982).

By any reasonable standard of jurisprudence the fact and proof of waiver existing and incorporated within the motion for declaratory judgment cannot be considered the subject of a prior litigation had in August, 1984.

One is then left with the conclusion that no matter what

the guise under which his motion for declaratory judgment has been denied, the waiver itself is undisputed and admitted, but remains suppressed and excluded for no legitimate reason existing in the record of this case in the state court.

Such an act or order must act in violation of the due process clause of the federal constitution, notwithstanding the state constitution. Danner most certainly has raised the issue of due process at all times in the appeals in the state courts. See (Certiorari case no. 50241; Iowa appeal no. 88-207; Petitioner's brief, reply brief and application for further review; and Equity case no. 1748; Iowa appeal no. 85-1188; Respondent's brief and application for further review).

Any contention these respondents may wish to put forward concerning a motion to quash as being the only manner available in which to defend against their action simply does not obtain within the jurisdiction of the Iowa supreme court.

Although procedures for collection of support judgments in Iowa have been simplified somewhat, these respondents are now allowed to make orders mandating income withholding, where before in 1984, they were required to use the district court for a writ of execution under which they could garnish wages, this does not alter the fact of the writ to which this petitioner's responsive pleading was directed in September, 1984.

Respondent's strategy to the contrary, it is common practice in Iowa, evidenced both from the rules of procedure and also from a case such as *In re Marriage of Welsher*, 274 N.W. 2d 369, 372 (Iowa 1979), where the Iowa supreme court declared that it does not imply there is no forum for the litigation of equitable defenses, but such argument may be presented in proceedings for collection including garnishment or declaratory judgment. See also *Merrifield v. Troutner*, 269 N.W.2d 136, 137 (Iowa 1978).

Petitioner asserts that by his answer he merely pleaded further relief as based on the facts and evidence, and that such pleading was not waived by his motions. Any denial of the motion

for declaratory judgment on the grounds so stated must be considered as an abuse of discretion and illegal when based upon the record so made in the state district court.

CONCLUSION

Petitioner therefore respectfully requests this Court to summarily reverse the order of the Iowa supreme court which denied him his application for further review there under a certiorari appeal. Further review there being consonant with the fact he was denied due process and equal protection in violation of his Fourteenth Amendment rights and where he might have obtained a just ruling based upon his answer whose substantive merit is consistent with both the opinion of this Court and the legitimate requirements of the state of Iowa.

This petition for certiorari directed to the Iowa supreme court should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 88-207

ORDER

Filed February 3, 1989

David John Danner, Appellant,

vs.

Dorothy Klosterbuer,

Asst. Johnson County Attorney,

and

Director,

Child Support Recovery Unit,

State of Iowa ex rel., Appellees.

The application for further review filed by plaintiff-appellant is hereby overruled and denied after consideration by this court en banc. Dated this 3rd day of February, 1989.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin

Arthur A. McGiverin, Chief Justice

APPENDIX B

IN THE COURT OF APPEALS OF IOWA

NO. 8-507/88-207

OPINION

Filed November 29, 1988

David John Danner, Appellant,

vs.

Dorothy Klosterbuer,

Asst. Johnson County Attorney,

and

Director,

Child Support Recovery Unit,

State of Iowa ex rel., Appellees.

Appeal from the Iowa District Court for Johnson County (No. 50241), Paul J. Kilburg, Judge.

The plaintiff filed a district court certiorari proceeding challenging an order of the Child Support Recovery Unit ordering an assignment of his wages for child support. REVERSED, WRIT SUSTAINED.

David John Danner, Iowa City, plaintiff-appellant, pro se.

Anne Lahey, Asst. Johnson County Attorney, for the defendant-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

SACKETT, J.

We address plaintiff-appellant David John Danner's claim the child support recovery unit acted improperly when it ordered an assignment of his income pursuant to Iowa Code chapter 252D (1987) to pay a child support obligation. The matter came before the trial court on plaintiff's petition for certiorari. The trial court after a hearing annulled the writ. We determine the department failed to follow the proper notice procedures when they ordered an assignment of income. We reverse the trial court.

In 1984 the Iowa legislature passed an act on delinquent support payment and the assignment of income (see 84 Acts, Ch.

1239 section 7). The act is designated chapter 252D. The act, among other things, provides after meeting certain procedural requirements the child support recovery unit or the district court shall enter orders assigning income for child support obligations.

Danner's marriage had been dissolved in Johnson County in 1974. The dissolution decree ordered Danner to pay child support. In August 1986 the department determined Danner was delinquent in his child support payments and sought to utilize the provisions of chapter 252D to put into place a wage assignment.

Because Danner's support obligation was established before July 1, 1984, it was required he be notified of the mandatory assignment of income under section 252D.1. Notification was required in accordance with section 252D.3, which provides in relevant part:

> . . . [f]or orders for support entered before July 1, 1984, the clerk of the district court, the child support recovery unit, or the person entitled by the order to receive the support payments, shall notify each person ordered to pay support under such orders of the mandatory assignment of income required under section 252D.1. The notice shall be sent by certified mail to the person's last known address or the person shall be personally served with the notice in the manner provided for service of an original notice at least fifteen days prior to the filing of a petition under section 252D.1, subsection 4 or the ordering of an assignment of income under section 252D.1, subsection 3 or 4. A person ordered to pay support may waive the right to receive the notice at any time. (emphasis added).

An affidavit is filed stating notice of a potential assignment was mailed to Danner's last known address by certified mail

on July 31, 1986. The notice was unclaimed. It was returned to the department on August 14, 1986. Also on July 31, 1986, Susan Halverson, Support Recovery Unit Officer, signed an order notifying Danner a wage assignment was to be ordered. There is no proof on file showing Halverson's order was mailed to Danner.

On August 14, 1986, an order for mandatory withholding was entered by the department. This notice was sent to Danner's employer.

The July 31, 1986 order notifying Danner and the August 14, 1986 order assigning his wages sought to allow the department to order an assignment of income in accordance with section 252D.1 (3) which provides in relevant part:

> If support payments ordered under section . . . 598.21, . . . are not paid to the clerk of the district court pursuant to section 598.22 and become delinquent in an amount equal to the payment for one month, upon application of a person entitled to receive the support payments, the child support recovery unit or the district court may enter an ex parte order notifying the person whose income is to be assigned, of the delinquent amount, of the amount of income or wages to be withheld, and of the procedure to file a motion to quash the order of assignment, and shall order an assignment of income and notify an employer, trustee, or other payor by certified mail of the order of the assignment of income requiring the withholding of specified sums to be deducted . . .

Danner contends the order assigning his income was entered by the department without meeting the notice requirements of the statute. We agree and therefore find it unnecessary to address his second issue that the department computed his unpaid child support an an incorrect figure.

APPENDIX B

Because the order for Danner to pay child support was entered prior to July 1, 1984, it was necessary before entering a support assignment to follow the notice dictates of two sections; namely sections 252D.3 and 252D.1(3). A notice under 252D.3 was required to be sent fifteen days prior to an assignment of income under section 252D.1(3). The department proceeded prematurely. The 252D.3 notice was mailed July 31, 1986. The assignment order was entered August 14, 1986. Iowa Code section4.1(2) provides with reference to construction of statutes in applicable part, "In computing time, the first day shall be excluded and the last day included . . . ." In counting days according to the dictates of Iowa Code section 4.1(2), we determine only fourteen days passed from the mailing of the notice to the entry of the order assigning income.

We note too there is no proof Danner was notified of the order entered by the department on July 31, 1986, notifying Danner his income was to be assigned, the amount of the assignment and the procedure to quash. See Iowa Code section 252D.1(3).

Having failed to comply with the statutory procedures, the department exceeded its jurisdiction in entering the order. The trial court should have sustained the writ. We reverse and quash the mandatory order.

REVERSED, WRIT SUSTAINED.

APPENDIX C

IN THE COURT OF APPEALS OF IOWA

NO. 6-125/85-1188

OPINION

Filed June 25, 1986

In re the Marriage of Kathleen Ann Danner and David John Danner

Kathleen Ann Danner, Appellee,

and

David John Danner, Appellant.

Appeal from the Iowa District Court for Johnson county (No. 1748)-Thomas L. Koehler, Judge.

Respondent appeals an adverse ruling in a declaratory judgment action and a denial of his application for a temporary injunction. AFFIRMED.

David John Danner, respondent-appellant, pro se.

Thomas J. Miller, Attorney General; J. Livingston Dunkle, Asst. Attorney General; and Anne Lahey, Asst. Johnson County Attorney, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ. PER CURIAM

Respondent appeals an adverse ruling in a declaratory judgment action and a denial of his application for a temporary injunction. We affirm.

Respondent David Danner and petitioner Kathy Danner dissolved their marriage in 1975. Kathy was awarded custody of their minor child, and David was ordered to pay $30.00 per week in child support. In 1984, petitioner garnished respondent's wages to collect the current and overdue child support. David moved to quash the garnishment alleging he had been denied visitation, the garnishment was barred by laches, the amount of child support was in error, and his low income justified reducing the amount.

The trial court held, in August, 1984, that portions of the child support were not enforceable due to laches and that respondent had paid portions of the amount owed during the time he was

alleged to have not paid anything. Consequently the trial court reduced the amount owed by respondent since May 6, 1979, to $7,470.00. All other issues raised at the hearing were overruled and denied, including respondent's assertion that his child support obligations were being properly handled by establishing an escrow account for the child's benefit.

In May, 1985, respondent filed, pro se, a declaratory judgment action challenging the trial court's ruling and a temporary injunction to prevent enforcement of the ruling. Respondent failed, however, to raise any new issues or claims in the declaratory judgment and in the application for a temporary injunction. He once again attacked the trial court's holdings concerning visitation and child support. He also requested monetary damages due to limitations placed on visitation by petitioner. The trial court overruled and denied respondent's motions because the issues had already been litigated and determined by the trail court in August, 1984.

We agree with the trial court and conclude that respondent's motions are barred by the doctrine of res judicata. "A valid and personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Noel v. Noel, 334 N.W.2d 146, 148 (Iowa 1983). The trial court was confronted in August 1984, with a series of events of substantially the same sort, all arising out respondent's obligation to petitioner and vice versa. All claims arising out of that series of events and obligations were in fact litigated and determined by the trial court at that time. Respondent raises no new issues or claims that could or should not have been litigated in the prior action. The trial court's denial of his motions is therefore affirmed.

AFFIRMED.

APPENDIX D

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NO. 1748

ORDER

Filed July 19, 1985

In re the Marriage of Kathleen Ann Danner and David John Danner

Kathleen Ann Danner, Petitioner,

and

David John Danner, Respondent.

Respondent's Motion for Declaratory Judgment, Application for Temporary Injunction, and Motion for Production of Documents were heard on the 19th day of July, 1985, at 9:00 a.m. The Petitioner appeared by Assistant Johnson County Attorney Anne Lahey. The Respondent appeared personally without counsel.

The Court, having reviewed the file and heard the arguments of counsel, finds that neither the Petitioner nor the Respondent submitted any evidence with regard to the Motions and Application. On the 31st day of August, 1984, this Court, by the Honorable L. Vern Robinson, entered an Order restricting the enforcement of the prior judgment without reducing the amount. The Respondent is attempting to relitigate many of the same issues without following the correct procedure. The Respondent is advised to seek legal counsel. The Motions and Application should be overruled and denied.

IT IS, THEREFORE, ORDERED that Respondent's Motion for Declaratory Judgment, Application for Temporary Injunction and Motion for Production of Documents are overruled and denied.

IT IS FURTHER ORDERED that the funds in the hands of the City of Iowa City in the amount of $1,672.38 should be condemned and applied to the judgment. The City of Iowa City is hereby ordered to pay to the petitioner the sum of $1,672.38 by forwarding same immediately to the Clerk of this Court.

Clerk to notify counsel and the Respondent.

Dated this 19th day of July, 1985.

APPENDIX D

/s/ Thomas L. Koehler

JUDGE SIXTH JUDICIAL
DISTRICT OF IOWA

APPENDIX E

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NO. 50241

PETITION FOR CERTIORARI

Filed September 26, 1986

David John Danner, Plaintiff,

vs.

Dorothy Klosterbuer,

Asst. Johnson County Attorney,

and

Director,

Child Support Recovery unit,

State of Iowa ex rel., Defendants.

COMES NOW Plaintiff and respectfully states to the Court, as follows:

1. Plaintiff is party to an action commenced by State of Iowa ex rel., thereby attaching his wages for support payment.

2. Defendants are representatives of the State of Iowa in said action brought against Plaintiff.

3. That Defendants acting in a judicial capacity have issued an Order withholding Plaintiff's wages, wherein they base said action on a Decree of Dissolution granted to a Kathleen Ann Danner.

4. That said Initial Decree of Dissolution is and was conclusive by operation of law, with regard all provisions set forth in said decree.

5. That public assistance is not now nor has it ever been at issue.

6. That previous, Plaintiff had moved this Court for relief from judgment given Kathleen Ann Danner on various equitable grounds and plaintiff has his objection to attachment with the defendants.

7. Plaintiff has not been served or properly notified by defendants of the present withholding of his wages as required

by law.

8. Plaintiff, under the terms of the Initial Decree, had made binding arrangements with Kathleen Ann Danner for payment of support. These payments are current to date and do include an arrearage.

9. That there is no evidence that Plaintiff's payment of support works a hardship on or acts against the best interests of his child.

10. That Kathleen Ann Danner, in an Order by this Court, is barred by reason of laches from collecting a portion of the judgment accorded her in the Initial Decree.

11. That the defendants have no jurisdiction under the provisions of the Initial Decree of Dissolution and that the Defendants have acted illegally when withholding the wages of Plaintiff.

WHEREFORE, Plaintiff prays that a Writ of Certiorari issue, and that the matter be set for hearing whereby the Defendant's action be annulled and the same decreed void, and that Plaintiff have judgment for costs and such amounts as the Defendants have illegally impounded.

/s/ David Danner
David Danner,
Box 1793, Iowa City, IA, 52244,
Plaintiff.

Exhibits annexed.
(Verification omitted here).
(The document here reproduced is attached and certified).

I, /s/ Kathleen Danner , do hereby waive all claims to the University of Iowa Credit Union member no. 0019850007 and surrender all rights of joint ownership on that account.

Signature /s/ Kathleen Danner
Witness /s/
Date October 23, 1981

APPENDIX F

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NO. 1748

NOTICE

Filed on Return May 20, 1985
Kathleen Ann Danner, Petitioner,
and
David John Danner, Respondent.

To the aforesaid Petitioner, Kathleen Danner:

You are hereby notified that Respondent's Motion for Declaratory Judgment, is now on file in the Office of Clerk of the District Court, Johnson County, Iowa, a true copy of which Motion hereto attached.

You are also notified to appear before said Court at Iowa City in Johnson County, Iowa, within 20 days after service of this Notice upon you, and unless you so appear between the hours 8:00 a.m. and 4:00 p.m., you serve, and within reasonable time thereafter file a written special appearance, motion, or reply, judgment or decree by default will be rendered against you for the relief demanded in the heretofore said Motion.

For further explanation of the consequences of this Notice, you are advised to consult an attorney.

Edward F. Steinbrech
Clerk of the above Court
/s/ Sandy Dains, Deputy
Johnson County Courthouse
Iowa City, Iowa 52240
(Seal of Court Clerk Affixed)

APPENDIX F

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NO. 1748

MOTION FOR DECLARATORY JUDGMENT

Filed on May 2, 1985

STATE OF IOWA ex rel.

Kathleen Ann Danner, Petitioner,

vs.

David John Danner, Respondent.

COMES NOW Respondent pursuant Iowa Rules of Civil Procedure, Rule 261, and states:

1. That the Answer and Counterclaim contained therein, dated September 11, 1984, as made by Respondent, is by this reference incorporated herein and made part hereof as though fully set forth.

2. That Respondent believes Declaratory Relief is appropriate based on the uncontroverted facts as stated in the Answer and Counterclaim contained therein and that this Motion goes to the whole of the defense and claim so made. Should,however, another remedy exist, Respondent respectfully requests leave of the Court to amend as directed, provided for by Iowa Rules of Civil Procedure, Rule 107.

3. That as the court must judicially notice under Iowa Rules of Civil Procedure, Rule 94, the issuance of the writ of execution to Petitioner is without a complete cause of action under the Decree of February 11, 1975. Petitioner, Kathleen Danner, has not entered of record and has refused to answer written statements to her signature, swearing to and showing facts material and proper to such issuance and the course of this action.

4. That as the Court must judicially notice under Iowa Rules of Civil Procedure, Rule 94, the action of Petitioner regarding the return of funds gained under said writ of execution is and has been void with regard to the time for such return of funds to be made to Clerk of the District Court, Johnson County, on all

such returns made.

5. That dispute exists regarding the rights and intentions of Petitioner to enforce the Judgment accorded her from the Decree of February 11, 1975, by writ of execution.

6. That this Motion is sufficient to disclose an existing justiceable controversy of sufficient immediacy and reality in which respondent has a real and present interest to warrant the issuance of a Declaratory Decree.

WHEREFORE, Respondent prays:

1. For a Declaratory Judgment whereby Petitioner be equitably estopped from further enforcing the Judgment of February 11, 1975 and any subsequent modification thereof by a Decree preventing her any levy or execution on the property or wages of Respondent, now and hereafter.

2. For a Declaratory Judgment assessing damages against Petitioner for knowingly and willfully secreting the minor child of Respondent from him in a reckless and grossly negligent manner, so as to inflict the damage complained of. The Judgment to encompass actual damages and exemplary damages, each specie of damages in the amount as set forth in the Counterclaim and prayed for there.

/s/ David Danner

David Danner
Box 1793, Iowa City, IA, 52244,
Respondent.

APPENDIX F

NO. 1748

AFFIDAVIT OF SERVICE

Filed on Return May 20, 1985

State of Nebraska

ss:

County of Douglas

The undersigned being first duly sworn, deposes and states:

1. That on the 7 day of May, 1985, I served the attached Notification and Motion on the Petitioner, Kathleen Danner, in the captioned case of the Iowa District Court, Johnson County, Equity 1748.

2. That said service was accomplished by delivering to her a true copy of each thereof.

3. All of which was accomplished in Omaha, Douglas County, State of Nebraska.

/s/ J. M. Tramp

Deputy Sheriff-Douglas County-NE

Signature of Officer Serving Such

Subscribed and sworn to before me this 13th day of May, 1985

/s/ Rose M. Cemore

General Notary-State of Nebraska

My commission expires: February 14, 1988

(Seal of Notary is Affixed)

APPENDIX G

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NO. 1748

ANSWER

Filed September 11, 1984

Kathleen Ann Danner, Petitioner,

vs.

David John Danner, Respondent.

Answering the writ of general execution of the Petitioner, Kathleen Danner, Respondent, David Danner, pursuant Iowa Rules of Civil Procedure, Rule 86, as distinct defense alleges:

1. That Petitioner was guilty of constructive fraud in petition to the original action and Respondent appeared and so objected. Respondent exercised due diligence in attempting to discover material fact and secure counsel, but through misfortune was not able to effect either. Respondent's misfortune being proportional to the scandalous conduct of Petitioner before she joined the original action. Petitioner maintained merely a pecuniary interest in this action. Petitioner is aware of the statute of limitations in regard to other actions to which she might be party. Petitioner is guilty of laches and unreasonable delay in bringing this action forward.

2. That Petitioner is guilty of active negligence and constructive fraud since having moved her residence from the State of Iowa on or about April 1, 1975. Petitioner had a duty to furnish her current address to Respondent and Clerk of the District Court, Johnson County. Respondent had and would have continued to make support payments if he had not been so misled by Petitioner Petitioner did effectively and without cause deny Respondent access to his minor child from April 1, 1975 to May 6, 1979. Petitioner has received the benefit she desired while Respondent has suffered corresponding loss. Respondent has been prejudiced and disadvantaged. Petitioner has without cause denied Respondent any viable or significant access to his minor child since May 6,

APPENDIX G

1979.

3. That it is and always has been the intent of Respondent to fulfill his support obligation to Petitioner. Respondent has consistently sought to tender money to Petitioner in support of his minor child. The final decree entered February 11, 1975 does not direct payment to Clerk of the District Court, Johnson County. Petitioner did not file a correct address of her residence with said Clerk until on or about April 1, 1984. Petitioner has sought to evade Respondent's tender of support without cause in order to deny him access to his minor child. Petitioner has accepted sums of money from her affinal relations in consideration for their access to Respondent's minor child. There is a discernable and classic pattern designed to deny or freeze Respondent out of any contact with his minor child so that Petitioner might assert an undue influence over said child. Respondent has been damaged by these wrongful acts. Respondent, in December, 1980, established a joint account, #0019850007, under Petitioner's signature so that support money could be drawn by her and the residence of Petitioner would not be at issue. Petitioner mismanaged said account with wrongful intent and waivered her rights over said account on October 23, 1981 without consideration. Petitioner's intent was to further deny Respondent access to his minor child.

4. Respondent does not deny that a judgment exists but due to particular facts, not the least of which is the fraud of Petitioner, equity demands that the benefits flowing from said judgment be denied Petitioner by virtue of the writ of general execution. Respondent is of the belief that there does not exist an adequate relief from said judgment at law and in order to prevent an injustice, equitable relief be granted Respondent by quashing said writ of execution. Petitioner has not maintained a complete cause of action by failing to supply and denying support payments made by Respondent. It would be inequitable to

make Respondent pay twice.

5. That it is inequitable to allow Petitioner recovery under said writ of execution because she has not done equity. Thus Petitioner be equitably estopped from recovery due to her fraud. The garnishment is an excessive burden upon Respondent and impends bankruptcy from which the construction of Title 15, Section 1673, United States Code Annotated allows relief. It is not in the best interest of Respondent's minor child that he be bankrupt. Further enforcement by garnishment will serve only to further the injustice already visited upon Respondent.

6. Respondent has, since petitioner waivered support payment on October 23, 1981, established a separate and distinct constructive trust under the social security number of his minor child and deposited into said account support money from the account, #001985007, waivered by Petitioner. Respondent is of the belief that the long range best interests are better served when support for his minor child is placed in said trust account. Respondent has deposited, not withdrawn from said trust account and will continue to deposit for the support of his minor child. The deposits into account #0019850007 continue to this day under an automatic payroll deduction.

7. Respondent has always sought to enforce his rights of visitation. Respondent is entitled to exert his right as superior to those claimed by any other affine or consanguine, with the exception of Petitioner, into whose physical custody his minor child was placed. Respondent has made 80 requests for visitation since May, 1979, only 14 of which have been granted by Petitioner, in willfull violation of the final decree of February 11, 1975.

DIVISION II.

By way of Counterclaim against the Petitioner, Kathleen Danner, Respondent, David Danner states:

1. That Petitioner in her writ of general execution of May

14, 1984, places judgment against Respondent in the amount of $14,220.00.

2. That Respondent by Affidavit, August 31, 1984, swore no more than 200 hours total visitation with his minor child since April 1, 1975.

3. That by dividing Respondent's total visitation time, 200 hours, into the judgment sworn by Petitioner, $14,220.0, a multiple of approximately 71 is reached.

4. That Respondent has made repeated requests for access to his minor child as sworn by affidavit, August 31, 1984, totaling 80 in number since locating his child on May 6, 1979.

5. That Respondent maintains a visit of 16 hours every 6 weeks conforms with the final decree entered February 11, 1975. This equals 77 visits since April 1, 1975 and totals 1232 hours as the legal right of Respondent under said decree.

6. That Respondent was seriously aggrieved when deprived by Petitioner of reasonable visitation without cause. This active negligence on the part of Petitioner carries a liability for consequences, which in light of attendant circumstances could reasonably have been anticipated by a prudent person. The liability of Petitioner amounting to 1032 hours of visitation, reached when subtracting 200 hours granted from 1232 hours as Respondent's by decree.

7. That Respondent asks for actual and exemplary damages be assessed against Petitioner due to her active negligence in the granting of reasonable visitation with Respondent's minor child, as Respondent's right by decree. In computing a dollar amount, the figure is reached when multiplying 1032 hours by 71, arriving at $73,272.00.

Wherefore Respondent prays the Court award him such damages as deemed equitable and seems just in the premises and not to exceed $73,272.

APPENDIX G

/s/ David Danner

David Danner,
Box 1793, Iowa City, IA, 52244
Respondent.

Exhibit attached.

(The document here reproduced is attached and certified).

I, /s/ Kathleen Danner, do hereby waive all claims to the University of Iowa Credit Union member no. 0019850007 and surrender all rights of joint ownership on that account.

Signature /s/ Kathleen Danner
Witness /s/
Date October 23, 1981

(verification omitted here).

APPENDIX H

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NO. 1748

ORDER

Filed August 31, 1984

In re the Marriage of Kathleen Ann Danner and David John Danner

Kathleen Ann Danner, Petitioner

and

David John Danner, Respondent.

This case came before me pursuant to Respondent's Motion for Judgment notwithstanding Verdict, Motion for Stay Pending Application for Judgment, and Motion to Amend or Enlarge Findings or Conclusions. On August 3, 1984, I heard the Defendant's Motion to Quash Garnishment and Motion to Correct Judgment. I overruled the motions on August 6, 1984. I set Respondent's motion for hearing because of the fact that the Respondent pointed out that the judgment entry did not provide child support payments be made through the Clerk of Court's Office and there was a problem in determining how much was in fact owed.

This case and these proceedings are unusual! The Defendant has appeared personally and without counsel. He was originally ordered to pay temporary child support in the sum of $30.00 per week by Judge Louis Schultz in October of 1974. Apparently, he has made those payments. Also, he was ordered to pay $30.00 per week child support by Judge James Carter in the Decree of Dissolution filed February 11, 1975. The Decree does not provide that the Respondent should make the support payments through the Clerk of Court's Office, even though the temporary support order did. It appears that the Respondent did pay support through the Johnson County Clerk of Court until April of 1975, when his former wife and child left the State of Iowa. they did not tell the Respondent where they were going, and the Respondent was unable to locate the whereabouts of his wife and child until May of 1979. Contact was made through his brother. The Respondent has

submitted a number of exhibits which will be made a part of this record and which show the Respondent made valiant efforts to locate the whereabouts of his former wife and daughter. After May 6, 1979, the Respondent did have contact with his child. He did make some support payments in the form of cash and personal checks. These payments amount to $840.00 to the present date. The Respondent claims that he has been paying into an escrow account for his daughter's benefit for several years. He indicates that he is the only one who has access to this account. The petitioner has garnished the Respondent's wages. The issue before the Court is whether or not that garnishment should be quashed.

If the Court accepts all the Respondent's statements as true, it would appear unfair for the Petitioner to be garnishing the Respondent's paychecks for child support payments which were due between April of 1975 and May of 19879. The defense of laches would apply. Laches applies where there has been an unreasonable delay in asserting a remedy. See Davidson vs Van Lengen, 266 N.W.2d 436 (Iowa, 1978). The defense of laches is available only where it would be inequitable to allow recover. An element of laches is injury or prejudice to the party against whom judgment is sought to be enforced. See Lovlie vs Plumb, 250 N.W.2d 56 (Iowa, 1977). The record in this case indicates that the Respondent had no obligation to make support payments through the Clerk of Court, and further did not know where to send the support payments until May of 1979. It appears unequitable at this point in time to be garnished for those amounts of money. Respondent, however, should be responsible for child support payments from May 6, 1970. The Court has calculated that since that time until the present date, there have been 277 weeks where child support is due. This number of weeks times $30.00 is $8,310.00. Further, the Court deducts the sum of $840.00 paid directly to the Petitioner in the form of checks or cash. This leaves a balance of $7,470. Clearly this sum is due, and the Respondent is subject to garn-

ishment for said amount.

IT IS THEREFORE THE ORDER OF THIS COURT that the Motion to Quash the Garnishment is overruled. The Motion for Judgment Notwithstanding the Verdict is overruled with the exception that the Court orders that the only amount which can be attached or garnished by the Petitioner is the sum of $7,470.00. The Court is not reducing the judgment, but is restricting the enforcement of it. See Anthony vs Anthony, 204 N.W. 2d 829 (Iowa, 1973). The Motion for Stay Pending Application for Judgment is overruled, and the Respondent's Motion to Amend or Enlarge Findings or Conclusions is overruled with the exception of additional findings in this ruling.

The Respondent was advised to seek legal counsel in this case. So there is no dispute as the the Court's ruling, the Court is not staying or stopping any garnishment or executions in the sum of $7,470.00 as to this date. The judgment will increase if child support payments are not made as ordered.

Dated this 31st day of August, 1984.

/s/ L. Vern Robinson
L. Vern Robinson
Judge of the 6th Judicial
District

APPENDIX I

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NO. 1748

MOTION TO QUASH WAGE GARNISHMENT

Filed July 5, 1984

Kathleen Ann Danner, Petitioner,

vs.

David John Danner, Defendant.

The undersigned defendant moves to set aside the attachment of his wages herein and for an order that the garnishee forthwith pay them to him forthwith because:

1. Defendant is employed by the garnishee and is entitled to receive personal earnings from that employment.

2. Defendant has been deprived of said earnings, and of their use and benefit, and unless set aside, said garnishment shall deprive defendant of certain subsistence needs, to wit, shelter and food, during this interval. The garnishment being issued and the earnings being impounded, without defendant having any opportunity to be heard on the merits of the claim against him before being thus deprived of his wages.

3. Defendant has attempted numerous times, in good faith, to comply with the cause of this action, id est by establishing an account under petitioner's signature and paying into said account such monies as could be drawn freely by petitioner. Defendant has attempted, at all times, to the best of his ability, to provide a suitable environment for the care and support of his minor child. Petitioner is gainfully employed and has stated on occasion that her wages are in excess of those of defendant.

/s/ David Danner

David Danner
P.O. Box 1793
Iowa City, Iowa 52244
Defendant